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NO.

77-1368

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

JAMES HAROLD DONDICH, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO.

JAMES HAROLD DONDICH, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATE COURT OF APPEALS FOR THE NINTH CIRCUIT

Michael S. Hegner, on behalf of James Harold Dondich, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The Memorandum opinion of the Court of Appeals (App. A, *infra*) was not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 1978. The

jurisdiction of this Court is invoked pursuant to 28 U.S.C.1254(1).

QUESTIONS PRESENTED

1. Whether failure of counsel, apapointed by the Court pursuant to the Criminal Justice Act (Title 18 United States Code, section 3006A(b), to file pretrial motions and pursue discovery on behalf his client deprived petitioner of his Sixth Amendment right to "assistance of counsel."

2. Whether the substitution of counsel pursuant to appointed counsel's insistance immediately prior to the scheduled trial date, compounded the violation of petitioner's rights guaranteed by the Sixth Amendment.

3. Whether the lack of preparation and offensive trial tactics employed by trial counsel deprived petitioner of his right to "effective assistance of

counsel" perscribed in *McMann v. Richardson*, 397 U.S. 759.

4. Whether the representation on appeal by an acquitted co-defendant attorney, who had testified adversely to petitioner's prejudice during the trial, violated petitioner's Fifth Amendment right to "due process of Law" and Sixth Amendment right to "assistance of counsel".

CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States:

> 'No person shall' be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;'be compelled in any criminal case to be a witness against himself', nor be deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which districts shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Title 18 United States Code, Section 3006A(b):

(b) Appointment of counsel.-In every criminal case in which the defendant is charged with a felony or a misdemeanor, other than a petty offense, and appears without counsel, the United States magistrate or the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel. Unless the defendant waives the appointment of counsel, the United States magistrate or the court, if satisfied after appropriate inquiry that the defendant is financially unable to obtain counsel, shall appoint counsel to represent him. The United States magistrate or the court shall appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel, or when other good cause is shown. Counsel appointed by the United States magistrate or a judge of the district court shall be selected from a panel of attorneys designated or approved by the district court.

STATEMENT

An indictment returned in the United States District Court for the Central District of California charged petitioner and seven (7) others with conspiracy and substantive offenses in thirteen (13) counts. Count One charged a conspiracy (18 U.S.C. Section 371) to commit the substantive offenses of interstate transportation of stolen money and securities

(18 U.S.C. Section 2314), interstate transportation of counterfeited securities (18 U.S.C. Section 2314) causing persons to travel in interstate commerce (18 U.S.C. Section 2314), receiving stolen property (18 U.S.C.Section 2315), commission of wire fraud (18 U.S.C. Section 1343), misapplication of federally insured bank money (18 U.S.C. Section 656) and causing false entries in a federally insured bank books or ledgers (18 U.S.C. Section 1005).

Petitioner was found guilty as charged in Count one (18 U.S.C. Section 371); Count three (18 U.S.C. Section 1343; Section 2); Count four (18 U.S.C Section 2314; 2); Count five (18 U.S.C. Section 2315; 2); Count seven (18 U.S.C. Section 656; Section 2); Count nine (18 U.S.C. Section 2314; Section 2); count ten (18 U.S.C. Section 2314; Section 2); Count

eleven (18 U.S.C. Section 2314; Section 2) and Count twelve (18 U.S.C. Section 2314; Section 2) by jury. Subsequently, upon ex-parte motion by the Government the Court dismissed Count seven (18 U.S. C. Section 656; Section 2).

Dondich was sentenced to four (4) years on Counts one, four and five and two (2) years on Counts three, nine, ten, eleven and twelve of the indictment and ordered to pay a find of ten thousand dollars ($10,000) to the United States on each count for a total fine of seventy thousand dollars ($70,000). The sentence of imprisonment on each count was to run concurrently. (App. "B" *infra*).

Petitioner filed a timely notice of appeal and was enlarged upon a Personal Recognizance appeal bond in the sum of fifty thousand dollars ($50,000) with a

five thousand dollar ($5,000.00) cash deposit.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the conviction on Count three, ordering it dismissed, and affirmed the convictions on the remaining counts. Subsequently, a Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc was filed but ultimately denied on February 23, 1978(App. "C" *infra*).

Evidence presented during the forty-three day trial showed a series of comphisated financial transactions involving the defendants and investors during the sugar shortage of 1974 - 1975. Briefly stated, denfendants had entered into a contact worth over one and a half billion dollars, ($1,500,000,000.00) with the Mexican firm of Importadora y

Exportadora for the purchase of millions of meteric tons of refined sugar. The defendants then offered investors various amounts of sugar through a company named American International Trust Company (AIT) AIT was represented a- having subsidiaries named "Investment International Comapny," "Barmor Ltd.", and Underwriters Trust Company." AIT and subsidiarries listed assets of two hundred fifty million dollars ($250,000,000.00), plus an insurance binder of eleven million four hundred thousand dollars ($11,400,000.00) from Ohio Casualty Insurance Company insuring their performance for the sugar exports from Mexico.

Two investment groups, Aeris, S.A. and Baxter - Kelly, entered into contracts with defendants to purchase several million metric tons of the Mexican sugar. By the terms of their contracts, they

were required to deposit five hundred thousand dollars ($500,000.00) cash which was to be replaced within seven (7) days with a trade acceptance of approximately seventy million dollars ($70,000,000.00). Neither buyer was able to procure the required trade acceptance. Petitioner, pursuant to advice from an attorney, declared buyers in default and did not return the deposits, which had already been deposited in co-defendant, attorney Phillip Stein's, clients trust account and dispersed to Petitioner, co-defendants and others.

Subsequent investigation showed that the assets of International Trust and its subsidiarries were negligable and the insurance binder from Ohio Casualty Insurance Company was unauthorized. No sugar was ever imported under the original contract entered into by AIT and Importa-

dora y Exportadora.

2. On May 19, 1975, at time or arraignment, Petitioner was appointed counsel, Robert Ornstein, Esq., by the United States magistrate pursuant to provisions of the Criminal Justice Act (CJA), Title 18, United States Code, Section 3006A(b). An order was entered that all pre-trial motions were to be filed by June 23, 1975 and responses by July 2, 1975. A trial date of August 19, 1975 was calendared. Counsel for co-defendants filed a variety of motions but Petitioner's counsel filed none nor did he join in on any of the co-defendant's motions. The government filed timely responses.

Between July 14, 1975 and August 1, 1975, counsel for co-defendants filed additional motions to which the government responded. Again Petitioner's

counsel failed to file any pre-trial motions or join in on any of those filed by co-counsel.

On August 1, 1975, eighteen days prior to trial, appointed counsel appeared in Court and moved to be relieved as counsel based upon his belief that petitioner could afford retained counsel. He informed the Court that it was not petitioner's decision that he be relieved but rather a decision made by appointed counsel. He further informed the Court that he had written his client suggesting he hire private counsel and have him appear on August 1, 1975. He accused his client of not co-operating with him, in the preparation of the case, to which Petitioner objected but was denied a response.

Petitioner's newly retained attorney, Carl Stewart, Esq., was present in Court and even though it became evident that he

had been retained on that day (August 1, 1975), he had not been privy to any discovery and that he could not possibly start trial on the calendared date of August 19, 1975. After lengthy discussions concerning other trial dates, joining in on co-defendant's motions and repeated attempts to swear petitioner to refute Mr. Ornstein's accusations, the Court granted the substitution and reset the trial date for September 23, 1975, with the admonition that all counsel were to be prepared. Petitioner was granted additional time in which to file pre-trial motions and a hearing date of August 25, 1975 was set.

On August 25, 1975, when questioned about the contents of motions and discovery provided by the government, Mr. Stewart told the Court that he was unsure

about the progress in the case because he had gone on vacation right after being substituted in as petitioner's counsel. He stated that a law clerk had prepared the motions filed on behalf of Petitioner and that he had not read the government's response until that day (August 25, 1975) No motion for dismissal of the indictment was filed even though Mr. Stewart specifically mentioned motions on the indictment during the August 1, 1975 substitution hearing.

The trial started on September 24, 1975 and Mr. Stewart immediately requested a continuance until the following day for his opening statement. The reasons given were lack of preparation and failure to study certain documents. The Court denied the request and ruled that his failure to do so was a waiver. This was the commencement of many confrontations

between Mr. Stewart and the Court, in the presence of the jury, throughout the forty-three day trial.

On October 1, 1975, Mr. Stewart complained that he was not prepared to continue because he had not been given a list of unindicted co-conspirators sufficiently in advance of trial. (The list had been provided to all counsel in July, 1975).

On October 8, 1975, he stated he was not prepared to cross examine a witness because he had not had sufficient time to read a file which had been in petitioner's possession since the beginning of the trial.

On October 9, 1975, and October 16, 1975, he complained that he had not been provided with Grand Jury testimony of two (2) of the governments' chief witnesses (Lipton & Neel) even though the

transcripts had been turned over previously.

On October 22, 1975, Mr. Stewart stated; before the jury, that he had misplaced a crucial piece of evidence. When refused a brief continuance, he asked if the Courts' vacation plans were the reason for "pushing" the case.

On October 23, 1975, the United States attorney called a member of the Grand Jury, which had indicted the defendants, as a witness. No objection was lodged by Mr. Stewart.

By November 5, 1975, he announced that he was totally and inadequately prepared to continue and argued that petitioner was being denied a fair trial.

Finally, on November 13, 1975, Mr. Stewart became embroiled in the use of documents in cross-examining a witness, and candidly apologized to the Court and

the jury for his lack of understanding of the significance of the evidence.

During the government's summation on December 2, 1975, Mr. Stewart verbally attacked the assistant United States attorney, Julian S. Greenspun, by calling him a "liar" in front of the jury, resulting in a stern reprimand from the Court.

The trial culminated in a final argument, by Mr. Stewart, so confusing with intermixed mistatements of law and fact, that it was **inaffective** and even harmful to Petitioner's case.

3. Subsequent to Petitioner's conviction on December 12, 1975, a notice of appeal was filed in propria persona on January 12, 1976. A designation of record on appeal was filed on February 5, 1976, and on about October 20, 1976, the opening brief was filed in the Ninth

Circuit Court of Appeals.[1]

The thrust of the appeal only covered two points:

A. Whether the counts which Petitioner stood convicted of stated offenses under the laws of the United States of America;

B. Whether the prosecutor was guilty of prejudicial misconduct thereby depriving petitioner of a fair trial.

In addition to the aforementioned thrust, Mr. Stein concluded the brief on page 39 with the following closing statement:

> "The record herein contains, in addition to those issues presented above, countless errors, which in and of themselves warrant a reversal of Dondich's conviction. The issues presented herein are those upon which appellant believes the government will concede the merit of. It

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[1]The opening brief was **authored by** Phillip Stein, Esq. acquitted co-defendant and previous attorney for Petitioner until the April 24, 1975 indictment charging the conspiracy.

> It is respectfully requested of the Court to take judicial notice of such further errors contained in the record, and if the Court so wishes, appellant will brief and argue the same."

The appeal brief did not contain any attack upon the objections voiced by Mr. Stewart to the attorney - client testimony given by Mr. Phillip Stein during the trial. His testimony concerned various transactions involving the depositing into his client's trust account and ultimate **payment of the** $1,000,000.00 in sugar deposit funds.

There was no mention made of the invocation of the Fifth amendment by a severed co-conspirator called as a defense witness, who had been severed at the government's request, due to assurances by the prosecutor that he would be fully prosecuted and his testimony

used against him in his trial.[2]

The brief contained none of the obvious Jencks Act (18 U.S.C. Section 3500) and Brady v. Maryland situations which occurred during the forty-three day (43) trial; nor was there any mention of the prejudicial effect of calling a member of the Grand Jury which issued the indictment, to testify during the trial of that indictment, without prior approval of the court as required by law.

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[2]The witness, Mr. John Engstrom, had initially moved for severance, which was opposed by the government and denied by the Court on August 1, 1975. Subsequently, the government moved to sever Engstrom on September 9, 1975, based upon a Bruton statement which was made before the Grand Jury many moths previously and was continuously within the possession of the prosecution.

On October 21, 1975, Engstrom was supposed to testify on behalf of the defendants, but he took the Fifth amendment after assistant United States attorney, Julian Greenspun assured the Court that Engstrom would be prosecuted. On May 25, 1976, some five (5) months before

Nowhere was an argument presented concerning the sufficiency of the evidence introduced at trial in support of the indictment, nor the propriety of the jury instructions directing the application of facts adduced during the trial.

Considering that two of the chief witnesses (Cassidy and Lipton) had recanted their testimony under penalty of perjury and alleged that they were forced to prefabricate testimony designed to convict petitioner, it would seem reasonable that the brief would contain a discussion as to whether or not a new trial should have been granted pursuant to the post conviction motion for new

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Petitioner's opening brief was filed by Mr. Stein, the government dismissed their case against Mr. Engstrom.

trial that was filed December 24, 1975.[3]

The most obvious and serious apellate issue concerned effectiveness of Petitioner's pre-trial and trial counsel. Even though Mr. Stein sat through each and every day of the Court hearings as a co-defendant, experiencing the actions of Mr. Ornstein and Mr. Stewart, the obvious Sixth amendment issue was never raised upon appeal.

REASONS FOR GRANTING THE WRIT

1. THE FAILURE OF COURT APPOINTED COUNSEL TO FILE ANY PRE-TRIAL MOTIONS AND PURSUE NORMAL DISCOVERY DEPRIVED PETITIONER OF HIS SIXTH AMENDMENT

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[3]Rule 28, Federal Rules of Appellate Procedure allows a brief of seventy (70) pages to be filed. Enlargements of briefs may be applied for in lengthy cases such as this. Mr. Stein utilized thirty-nine (39) pages even though there were eleven thousand (11,000) pages of trial transcript

GUARANTEES AND FELL BELOW THE REQUIREMENTS OF 18 U.S.C., Section 3006A(b) OF THE CRIMINAL JUSTICE ACT.

The Sixth Amendment to the Constitution of the United States guarantees the defendant, in a criminal prosecution, the right to ". . . assistance of counsel for his defense."

The Criminal Justice Act (Title 18 U.S.C., Section 3006A (b) provides a defendant with the right to be represented by counsel and . . ."that counsel will be appointed to represent him if he is financially unable to obtain counsel."

Both the Sixth amendment and the Criminal Justice Act have been interpreted to mean the right to assistance of counsel in federal prosecutions (Johnson v. Zerbst, 304 U.S. 485, 492, 48 S. Ct. 1019 (1932). Implicit in the right to

counsel is the right to effective assistance of counsel (Powell v. Alabama, 207 U.S. 45, 47, 53 S. Ct.). This well settled doctrine applies equally to counsel appointed under the Criminal Justice Act in Title 18 United States Code, section 3006A (b). See (United States v. James, 301 F. Supp.107 (D.C. Tex. 1969); (United States v. Williams, 411 F. Supp. 854 (D.C. N.Y. 1976); and (Williams v. United States, 394 F 2d 957 (C.A.D.C. 1968).

It is the particular facts of each case and the actual conduct of the attorney with respect to his client, from the arrest until final judgment, that determines whether the attorney has provided the constitutionally required effective assistance of counsel. (United States v. Katz, 425 F. 2d 928, 930 (2nd Cir.1970); Chalk v. Beto, 429 F. 2d 225, 226 (5th Cir. 1970); United States v. Edwards, 488

F. 2d 1134 (5th Cir. 1970); and United States v. **Decoster,** 159 U.S. App. D.C. 326, 487 F 2d 1197, 1203 (1973).

The United States Court of Appeals for the Fifth Circuit defined the term "effective assistance of counsel" in terms of a "reasonable counsel" standard,

> "We interpret counsel to mean not errorless counsel, and counsel judged ineffective by hind sight, but counsel reasonably likely to render and rendering reasonably effective assistance." (MacKenna v. Sellis, 280 F. 2d 1952 (1960).

Measuring the minimal standards established by the courts, it is apparent that Mr. Ornstein's representation fell far below the minimum standards. His failure to file any of the required pretrial motions, join in on any of the motions filed by counsel for co-defendants, and even briefly glance through the

carton box of documents voluntarily turned over by the prosecution a month and one half prior to trial, amounted to, not only ineffective assistance of counsel, but no counsel at all.

Attorneys experienced in federal criminal defense work, especially those serving upon the indigent panels authorized by the Criminal Justice Act, know full well that a great many defendants win or lose based upon the quality of pre-trial motions and preparedness of counsel who argue the motions. Successful motions often result in dismissal of counts, suppression of evidence, or severance of defendants, thereby simplifying the preparations necessary for effective representation at trial.

2. THE ELEVENTH HOUR SUBSTITUTION OF COUNSEL COMPOUNDED THE VIOLATION OF

PETITIONER'S RIGHTS.

On August 1, 1975, Mr. Ornstein candidly admitted that he had ceased to represent petitioner because he was convinced that there were sufficient resources with which petitioner could retain private counsel. This was followed by allegations that petitioner had failed to remain in contact with him - a statement which petitioner attempted to refute, but was not allowed to do so by the Court.

Mr. Stewart admitted that he had only been able to make financial arrangements with petitioner on that particular day (August 1, 1975). He was willing to represent Mr. Dondich, but noted that previous counsel had failed to file any pre-trial motions, and that the trial date, August 19, 1975, was an

impossible one for him to meet because of a series of trials previously set up through October, 1975.[4]

The failure of Mr. Stewart to file a pre-trial motion aimed at the sufficiency of the indictment precluded appellate counsel from arguing that point on appeal. The fact that retained counsel did not read the government's responses to his law clerk's motions, until the day set for argument, exemplifies his lack of preparation and concern for that stage of the proceedings.

3. TRIAL COUNSEL'S TECHNIQUES WERE INEFFECTIVE AND OFFENSIVE

Petitioner's trial counsel, have sub-

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[4]There was no mention made that he was leaving on vacation between August 1, 1975 and August 25, 1975, although apparently the Court knew this.

stituted in shortly before trial, assumed the role of chief counsel in an extremely complicated conspiracy case involving hundreds of documents and dozens of witnesses. As the evidence unwound, it was difficult to determine whether the defendants intended to defraud the victims, or whether the victims were planning to defraud the defendants.

Having assumed the role indicated, it was paramount that Mr. Stewart be familiar with the demonstrative evidence, prior statements of witnesses, a general knowledge of banking procedures, import-export practices, and the various roles played by the defendants and victims. Unfortunately, he was unprepared in all of these areas.

Appellate Courts are, quite justifiably, hesitant to second guess and condemn

trial counsel's strategic or tactical decisions (United States v. Redford, 452 F 2d 332 (7th Cir. 1974). Nevertheless, this rule is not absolute. The choice of defense strategy and tactics must be an informed decision based upon proper investigation and preparation, both factual and legal (Moore v. United States, 432 F. 2d 730, 739 (3rd Cir. 1970); Wolfs v. Britton, 509 F. 2d 304, 309 (8th Cir. 1975); United States v. De Coster, 487 F. 2d 1197 (D.C. Cir. 1973); and Coles v. Peyton, 389 F. 2d 224 (4th Cir. 1968); McMann v. Richardson, infra.

Finally, trial counsel must possess the requisite knowledge of the law to be able to implement the strategice and tactical choices he has made (McQueen v. Swenson, 498 F. 2d 207 (8th Cir. 1974); People v. Nitti 312 Ill. 73, 143 N.E. 448 (1924); and People v. Iberra, 60 Cal 2d 460, 34

Cal Rptr. 863 (1959). Standing alone, trial errors, such as simply failing to object to the admission of inadmissable evidence or the failure to effectively cross-examine witnesses, may not constitute ineffective assistance of counsel, but when combined with other factors they become "highly relevant" in assessing a claim of deprivation of petitioners sixth amendment right. (United States v. Butler, 504 F. 2d 220, 224 (D.C. Cir. 1974).

Trial counsel's continual excuses for lack of preparation and requests for continuances, before the jury, eroded his effectiveness to the point of prejudicial misconduct. His final displays of anger at the prosecution and disappointment with the judge adversely effected petitioner's case to the point of certain conviction

4. APPELLANT REPRESENTATION WAS VIOLATIVE OF PETITIONER'S FIFTH AND SIXTH AMENDMENT RIGHTS

Considering that Phillip Stein, Esq. was a co-defendant, whose testimony adversely effected petitioner, it is surprising that the United States Court of Appeals for the Ninth Circuit allowed him the privilege to represent petitioner on appeal. In examining the appeal brief submitted, it is not surprising to note that there was no mention of the attorney-client privilege objections, raised by Mr. Stewart during the in-chambers conferences, concerning defendant Stein's right to testify in his trial.

Obviously, it would have been preferable to have severed Stein and tried

him separately;[5] however, trying petitioner and his attorney jointly raised a serious question concerning the propriety of testimony concerning the banking of, and disbursement of, approximately one million dollars of alleged bilked funds.

It is respectfully submitted that appellate attorney would be remiss in their representation of a client by not raising the issue for appellate judicial determination. Failure to raise notable issues not only violate the Sixth Amendment, but the due process guarantee of the Fifth Amendment as well.

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[5] Petitioner had moved for severance on August 19, 1975 but the Court denied the motion on August 25, 1975.

The inherent conflict between Stein and Petitioner is apparent and a serious inquiry into the propriety and ethics is in order.[6] A conflict between attorney and client violates the basic right to the effective assistance of counsel unfettered by fluctuating loyalties.

> "Such representation is lacking, however, if counsel unknown to the accused and without knowledgeable assent, is in a position where his full talents as a vigorous advocate having a single aim of acquitted by all means fair and honorable- are hobbled or fettered or restrained by commitments to others." (Porter v. United States, 298 F. 2d 461, 463 (5th Cir. 1962)).

It is respectfully submitted that since Mr. Stein's testimony aided in convicting

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[6]As appellant counsel, Stein could hardly attack his own testimony as incredible nor could claim that he had breached the attorney client privilege to the prejudice of his client. The safest course was to not raise the issue on appeal which is exactly what was done.

petitioner, while serving to exonerate himself (Stein) a duty was owed petitioner by the appellate Court to make inquiry of petitioner in order to determine whether he understood the dangers inherent in the conflict and whether he desired to continue being represented by Stein. (United States v. Gains, 529 F. 2d 1038 (7th Cir. 1976)); Baker v. Wainright, 442 F. 2d 145 (5th Cir. 1970).

The footnote to the Ninth Circuit Memorandum Opinion (Appendix "A") recognized the improprieties of the appellate representation, but failure to grant a rehearing en banc to argue that issue has denied petitioner of a remedy.

CONCLUSION

This may well be a unique case in that not only was there ineffective legal representation at the pre-trial and trial stages but the appellate level as well.

To date, no cases similar to this seem to have been reported; nor has the author discovered any authority for, or against, the proposition that "effective assistance" of counsel encompasses appellate counsel as well as trial counsel.

Simple justice and concern for the integrity of the legal profession require that this petition for a writ of certiorari be granted to determine definitive guidelines and rules pertaining to "effective assistance" of counsel at both trial and appellate levels of the practice of federal criminal law.

Respectfully submitted,

Michael S. Hegner
MICHAEL S. HEGNER

March, 1978

APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -vs- JAMES HAROLD DONDICH, SY GUTHRIE, EDWARD ZUPER, Defendants-Appellants.	)	Nos. 76-1221 76-1226 76-1227 MEMORANDUM

Appeal from the United States District Court for the Central District of California

Before: WRIGHT, WALLACE, and SNEED, Circuit Judges

Dondich, Zuber, and Guthrie were charged, along with others,[1] with conspiracy to commit offenses against the United States in violation of 18 U.S.C. Section 371 and 12 additional counts with substantive charges. The jury found against the three on Count I, the

conspiracy count, and against Dondich on Counts III, IV, V, VII, IX, X, XI and XII, Guthrie on Counts X, XI, and XII and Zuber on Count XIII. All three appeal, contending that the indictment was fatally defective. We agree with the charge that Count III is defective and as to that count, we reverse and remand for the entry of a dismissal. As to the remaining counts, we disagree with the appellants and affirm.

The initial question which confronts us is the basis upon which we rule as to whether or not this indictment is valid. Unless an objection is raised prior to trial, the only attack that may be made is that the indictment "fails to show jurisdiction in the court or to charge an offense . . ." Fed. R. Crim. P. 12(b) (2). Counsel in oral argument conceded that no specific

objection was made to the indictment sufficient to allow attack other than as to the failure to charge an offense and therefore our review is solely of that issue.

The argument is made that Count I charges no violation of federal law. However, reading Count I, we come to an opposite conclusion, especially considering paragraphs 6a to 6g. The argument is also made that the conspiracy is not adequately charged because every element of each substantive offense is not pleaded in detail. However, in an indictment for conspiracy, it is not necessary to describe the conspiracy with the same particularity as required in a substantive offense. Wong Tai v. United States, 273 U.S. 77, 81 (1927); United States v. Pheaster, 544 F.2d 353, 360 (9th Cir. 1976), cert. denied, 429 U.S. 1099 (1977); Danielson v. United States,

321 F.2d 441, 443 (9th Cir. 1973).

As regards Count III, the assistant United States Attorney candidly conceded error and we see no reason why this count should not be reversed and remanded to the district court for an order of dismissal.

As to Count IV, the arguments raised by Dondich are essentially a lack of notice. But that question can be raised only if attacked prior to trial. In any event, Count IV contains sufficient particulars to afford Dondich adequate notice.

Regarding Count V, the charge is made that the added words "wrongfully obtained" and "obtained by fraud," coupled with the court's instruction on conversion, served to confuse the jury in such a way that there was complete failure to charge an offense. Once more,

the argument about ambiguity smacks more of notice than of jurisdiction. Certainly any ambiguity here is not sufficient to indicate a failure to make the appropriate charge. The instructions stated that conversion may take place where initial possession by the person converting the goods was lawful. This language does not exclude conversion where the initial possession is unlawful as charged in the indictment.

With respect to Counts IX through XIII, it is asserted that the indictment fails to charge the appellants with knowledge that the securities were stolen and that therefore a charge has not been adequately made. Although these counts are not written in model form and certainly should not be used in future indictments by the United States Attorney a fair and reasonable construction would

would easily imply knowledge of the stolen nature of the securities.

Dondich and Guthrie also make several allegations of prosecutorial misconduct, mainly contending that there was a comment on failure to testify. We conclude, however, that the allegations are without merit.

As to Guthrie and Zuber, we affirm the conviction. As to Dondich, we reverse the conviction as to Count III and remand that count for an order of dismissal, but affirm as to all of the remaining counts. The mandate shall issue forthwith.

FOOTNOTES

1. We are not unmindful that Phillip Stein, Dondich's attorney on this appeal was indicted and tried for his connection with the offenses upon which this prosecution was based. While Mr. Stein was acquitted, we question the professional propriety of his representation of his former codefendants in this appeal.

The ABA Standards Relating to the Defense Function, Approved Draft, 1971, provide:

> 1.6 Client interests paramount.
>
> Whether privately engaged, judicially appointed or serving as part of a legal aid system, the duties of a lawyer to his client are to represent his legitimate interests, and considerations of personal and professional advantage should not influence his advice or performance.

We cannot escape the obvious conclusion that Mr. Stein's efforts in this case very likely were influenced by his extensive involvement in the underlying transactions and concern for his professional standing and reputation. A copy of this memorandum will be forwarded to the California State Bar Association.

UNITED STATES DISTRICT COURT FOR

CENTRAL DISTRICT OF CALIFORNIA

United States of America

vs. No. CR75-637

JAMES HAROLD DONDICH

Judgment and Probation

Commitment Order

In the presence of the attorney for the government, the defendant appeared in person on this date . . . JANUARY 12, 1976

WITH COUNSEL, Carl Stewart

There being a verdict of GUILTY, to Counts 1, 3, 4, 5, 9, 10, 11, & 12 of the Indictment.

Defendant has been convicted as charged of the offenses of Conspiracy in violation of Title 18 United States Code Section 371; Interstate Transportation of Stolen Property in violation of Title 18 United States Code Section 2314; Receiving Stolen Property in violation of Title 18 United States Code Section 2315; Wire Fraud in violation of Title 18 United States Code Section 1343 and Aiding and Abetting in violation of Title 18 United States Code Section 2, as charged in the Indictment.

The Court asked whether defendant had anything to say why judgment should not

be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years on each of Counts 1, 4 & 5 and two (2) years on each of Counts 3, 9, 10, 11, and 12 of the Indictment and that said defendant pay a fine to the United States on each of said Counts 1, 4, 5, 9, 10, 11 and 12 in the amount of $10,000, in the total sum of $70,000.

IT IS ORDERED that the sentence of imprisonment on each of said Counts shall run concurrently.

IT IS FURTHER ORDERED that the concurrent sentences herein shall run consecutively with the sentence to four (4) years imprisonment imposed by the United States District Court for the Middle District of Florida.

IT IS FURTHER ORDERED that the defendant is to stand committed until the fine is paid or he is otherwise discharged by due course of law.

IT IS FURTHER ORDERED that the execution of the sentence of imprisonment is stayed to 1-22-76, 12 noon, at which time the defendant is ordered to surrender to the U.S. Marshal, this building.

The court orders commitment to the custody of the Attorney General

FILED: January 12, 1976
Clerk, U.S. District Court

by: / Paul F. Smith
PAUL F. SMITH, Deputy Clerk

/ E. Avery Crary
E. AVERY CRARY

Date: January 12, 1976

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee.	)	No. 76-1221
-vs-	)	ORDER
JAMES HAROLD DONDICH, Defendant-Appellant.	)	

Before: WRIGHT, WALLACE and SNEED, Circuit Judges

The panel as constituted has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Petition for rehearing is denied and the suggestion for rehearing en ban is rejected.

Supreme Court, U. S.
FILED
APR 27 1978
MICHAEL RODAK, JR., CLERK

No. 77-1368

In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES HAROLD DONDICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1368

JAMES HAROLD DONDICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims he received ineffective assistance from counsel appointed to represent him before trial, from retained trial counsel, and from retained counsel on appeal.

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted of wire fraud, in violation of 18 U.S.C. 1343 (Count III); causing a person to travel in interstate commerce in order to defraud him, in violation of 18 U.S.C. 2314 (Count IV); receipt and disposition of stolen property transported in interstate commerce, in violation of 18 U.S.C. 2315 (Count V); misapplication of funds held by a federally insured bank, in violation of 18 U.S.C. 656

(Count VII);[1] four counts of interstate transportation of property obtained by fraud, in violation of 18 U.S.C. 2314 (Counts IX-XII); and conspiracy to commit these offenses, in violation of 18 U.S.C. 371 (Count I). He was sentenced to four years' imprisonment on Counts I, IV, and V and two years' imprisonment on each of the remaining counts, all to be served concurrently, and was fined a total of $70,000. The court of appeals affirmed his conviction on each count except for Count III, which it directed the district court to dismiss (Pet. App. A6).

During May 1975, Robert Ornstein was appointed by the district court pursuant to 18 U.S.C. 3006A to represent petitioner. Shortly thereafter, Ornstein discovered that petitioner was not indigent and therefore did not qualify for appointment of counsel. On July 1, 1975, Ornstein informed petitioner that he could not represent him as court-appointed counsel, that petitioner would have to retain private counsel, and that he "would undertake no effort whatsoever until [he] was informed by [petitioner] as to what he wanted [counsel] to do" (Tr. 202). He also advised petitioner to act quickly because the trial was scheduled for August 19, 1975 (Tr. 201). Petitioner told Ornstein that he would contact him the following week, but he failed to do so, and Ornstein's repeated efforts thereafter to reach petitioner were unsuccessful (Tr. 201-202).

On August 1, 1975, the district court granted Ornstein's motion to withdraw as counsel. Carl Stewart was substituted as retained counsel, and the trial was continued, with the acquiescence of Stewart, until September 23, 1975 (Tr. 214). On appeal, petitioner

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[1]Upon the government's motion, Count VII was dismissed before sentencing (Tr. 11,067-11,068).

retained Phillip Stein, a co-defendant who had been acquitted at trial and who had also been petitioner's attorney in certain matters before this case.

Petitioner's sole claim in this Court is that all three counsel who represented him below were ineffective. That claim is without merit. The representation petitioner received was well "within the range of competence demanded of attorneys in criminal cases." *McMann* v. *Richardson*, 397 U.S. 759, 771. In addition, we note that petitioner's claims concerning the ineffectiveness of his trial counsel were raised neither in the district court, where they could most appropriately have been considered by the judge with first hand knowledge of the situation (*United States* v. *DeCoster*, 487 F. 2d 1197, 1204-1205 (C.A.D.C.)), nor in the court of appeals. Because of this unexplained failure to raise the claims below, they are not properly before this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n. 7; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16.

1. Petitioner's claim that Ornstein was ineffective because he did not file any pretrial motions or pursue normal discovery, even if true, does not establish that petitioner was deprived of effective assistance of counsel at trial. Petitioner makes no showing that his court-appointed counsel's failure to file any pretrial motions irreparably prejudiced his defense. Stewart, as retained counsel, immediately joined in those pretrial motions filed by petitioner's co-defendants that could have yielded relief to petitioner, and he later filed motions for a bill of particulars, severance, production of exculpatory material, discovery, and inspection of grand jury transcripts, as well as a motion for dismissal of the indictment on the ground of prosecutorial misconduct (Tr. 215, 357-371). Stewart also received from Ornstein

copies of the voluminous documentary evidence that the government intended to introduce at trial (Tr. 206).[2] Thus, any possible deficiencies in Ornstein's representation of petitioner were corrected before trial commenced.

2. Nor was petitioner's representation by Stewart at trial ineffective. Besides general, unsubstantiated claims that Stewart was unprepared and that his technique was ineffective and offensive, petitioner's only specific allegation is that counsel's failure to file a pretrial motion challenging the sufficiency of the indictment precluded the raising of that issue on appeal (Pet. 28-31). Petitioner is incorrect. On appeal, petitioner claimed that the indictment was fatally defective because each count failed to charge an offense. The court of appeals reviewed each count and found that each was sufficient, except for Count III, which it reversed. Although counsel's failure to challenge the indictment before trial constituted a waiver of claims other than the failure of the indictment to show jurisdiction or to charge an offense (see *United States* v. *Droms*, 566 F. 2d 361, 363 (C.A. 2); *United States* v. *Busard*, 524 F. 2d 72, 73 (C.A. 5), certiorari denied *sub nom. Meyer* v. *United States*, 426 U.S. 948; Fed. R. Crim. P. 12(b)(2)), petitioner does not now show that there were other colorable claims that he was precluded from raising on appeal.

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[2]Ornstein had, apparently before he realized that petitioner was not entitled to appointment of counsel, made informal arrangements with the United States Attorney's Office to obtain all the documentary evidence that the government intended to introduce at trial. Two boxes of materials were turned over to Ornstein (Tr. 206).

3. Finally, petitioner contends (Pet. 32-35) that Phillip Stein, his retained counsel on appeal, was ineffective because Stein's interests as a co-defendant were inconsistent with his representation of petitioner.[3] Specifically, petitioner asserts that this conflict caused Stein to ignore on appeal an issue raised at trial concerning the consistency of Stein's trial testimony with petitioner's attorney-client privilege. Petitioner, having retained Stein as his appellate counsel with full knowledge of his role in the trial, should not now be heard to claim that he was unqualified to serve because of that role. In any event, the claim has no merit.

During trial, at an extensive *in camera* hearing, counsel for Stein requested the trial court to permit Stein to testify concerning certain details of petitioner's prior consultations with Stein about petitioner's tax problems and previous convictions (Tr. 6735-6788). Petitioner's trial counsel agreed that Stein could testify about these matters in general terms. The district court reviewed the proposed testimony and issued specific rulings to ensure that petitioner's attorney-client privilege was not breached by Stein's testimony. These rulings were generally accepted by petitioner's counsel. Indeed, the court in general ruled in favor of petitioner and against Stein. As a result, when Stein testified during trial, petitioner's counsel did not assert petitioner's attorney-client privilege. Accordingly, this matter involved no viable issue to raise on appeal. Stein's failure to attempt to raise an issue totally lacking

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[3]The propriety of Stein's representation of petitioner on appeal is an entirely separate issue from the effectiveness of that representation. The court of appeals, *sua sponte*, questioned the professional propriety of his representation and has referred the matter to the California State Bar Association (Pet. App. A7-A8). The matter is presently under review by the State Bar.

in merit is no indication that he was ineffective. See *Gillihan* v. *Rodriguez*, 551 F. 2d 1182, 1189 (C.A. 10), certiorari denied, No. 76-6815, October 3, 1977; *Harshaw* v. *United States*, 542 F. 2d 455, 457 (C.A. 8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

APRIL 1978.

DOJ-1978-04